

Rule 104. Preliminary Questions.

(a) **In General.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) **Relevance That Depends on a Fact.** When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

(c) **Conducting a Hearing So That the Jury Cannot Hear It.** The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

- (1) the hearing involves the admissibility of a confession;
- (2) a defendant in a criminal case is a witness and so requests; or
- (3) justice so requires.

(d) **Cross-Examining a Defendant in a Criminal Case.** By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(e) **Evidence Relevant to Weight and Credibility.** This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

Comment to 2012 Amendment

The language of Rule 104 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

Paragraph (a) — Questions of admissibility generally.

104.a.015 In determining preliminary questions on the admissibility of evidence, the trial court must use the preponderance of the evidence standard.

State v. Harrod, 200 Ariz. 309, 26 P.3d 492, ¶¶ 22–26 (2001) (trial court found by preponderance of evidence that witness had not been successfully hypnotized, but stated that, if standard were clear and convincing evidence, it would not have so found; court held trial court used proper standard).

104.a.060 The trial court is not bound by the Rules of Evidence in determining admissibility of evidence.

State v. Medina, 178 Ariz. 570, 575, 875 P.2d 803, 808 (1994) (in determining whether witness was “unavailable,” trial court properly considered prosecutor’s avowals; information presented was not, however, sufficient for court to conclude that witness was “unavailable”).

State v. Hutchinson, 141 Ariz. 583, 588, 688 P.2d 209, 214 (Ct. App. 1984) (even though trial court may consider otherwise inadmissible evidence in determining admissibility of evidence, this does not mean trial court should admit this inadmissible evidence for jurors to consider).

ARIZONA EVIDENCE REPORTER

State v. Rivera, 226 Ariz. 325, 247 P.3d 560, ¶ 17 (Ct. App. 2011) (in hearing to determine whether witness was “unavailable,” trial court was not bound Rules of Evidence).

State v. Silva, 137 Ariz. 339, 342, 670 P.2d 737, 740 (Ct. App. 1983) (in determining admission of laboratory report, trial court may consider hearsay to determine whether chain of custody requirement for narcotics has been satisfied).

State v. Simmons, 131 Ariz. 482, 484, 642 P.2d 479481 (Ct. App. 1982) (trial court may consider reliable hearsay in determining authentication of documents).

State v. Hadd, 127 Ariz. 270, 275, 619 P.2d 1047, 1052 (Ct. App. 1980) (at suppression hearing, trial court could consider tape recording not yet admitted in evidence).

State v. Spratt, 126 Ariz. 184, 186, 613 P.2d 848, 850 (Ct. App. 1980) (trial court could consider hearsay in determining availability of witness).

104.a.070 Abuse of discretion is an exercise of discretion that is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons.

State v. Wagner, 194 Ariz. 1, 976 P.2d 250, ¶ 39 (Ct. App. 1998) (trial court did not abuse discretion in admitting autopsy photographs), *approv'd in part & vac'd in part on other grounds*, 194 Ariz. 310, 982 P.2d 270 (1999).

State v. Dunlap, 187 Ariz. 441, 458, 930 P.2d 518, 535 (Ct. App. 1996) (trial court did not abuse discretion in admitting diary entries as statements of a co-conspirator).

Bledsoe v. Salt River Valley Water Users, 179 Ariz. 469, 473, 880 P.2d 689, 693 (Ct. App. 1994) (trial court's decision to allow plaintiff's counsel to show a videotape, not admitted in evidence, during closing argument, and to allow plaintiff's counsel to conduct an experiment during rebuttal argument, was abuse of discretion and required reversal).

State v. Woody, 173 Ariz. 561, 845 P.2d 487 (Ct. App. 1992) (because facts of defendant's prior DUI convictions were sufficiently similar to present offense that jurors could conclude defendant was aware of risks he posed to others in driving under influence, trial court did not abuse discretion in ruling that evidence was relevant to whether defendant showed reckless indifference to human life).

Paragraph (e) — Weight and credibility.

104.e.010 Once the trial court has determined that a party has presented sufficient admissible evidence upon which the jurors could conclude that certain facts exist, the parties are permitted to introduce additional evidence going to the weight and credibility of the initial evidence.

State v. Montañño, 204 Ariz. 413, 65 P.3d 61, ¶ 69 (2003) (defendant's claims on appeal that DNA is “magic” and “bogus,” that one witness had judgment against him, that *USA Today* ran article calling British DNA database “flawed,” and that DNA evidence was not overwhelming in this case, were merely attacks on weight of evidence, which was matter within province of jurors).

State v. Lehr, 201 Ariz. 509, 38 P.3d 1172, ¶¶ 16–31 (2002) (in consolidated action, judge holding consolidated hearing took judicial notice of fact that principles and theories underlying DNA analysis in forensic labs are generally accepted in scientific community and that RFLP method in particular met general acceptance test, and then held claimed deficiencies in laboratory procedure did not preclude admission of evidence; at trial, trial judge precluded defendant from cross-examining witness about laboratory procedure, ruling this would be re-litigating issues resolved at consolidated hearing; court held jurors must assess weight of evidence of laboratory procedure, and thus held trial judge erred in precluding this evidence). April 10, 2013